No. [redacted]

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. [redacted] Misc.

G. MENNEN WILLIAMS, Governor of the State of Michigan,

- and -

THOMAS M. KAVANAGH, Attorney General of the State of Michigan,

Petitioners,

v.

HONORABLE CHARLES C. SIMONS, Chief Judge, United States Court of Appeals for the Sixth Circuit,

HONORABLE ARTHUR F. LEDERLE, Chief Judge,

- and -

HONORABLE THEODORE LEVIN, Judge of the United States District Court for the Eastern District of Michigan, Southern Division, together forming a Three-Judge United States District Court constituted under 28 U.S.C. § 2284, pursuant to 28 U.S.C. § 2281,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, OR, IN THE ALTERNATIVE, FOR WRITS OF PROHIBITION AND MANDAMUS

- and -

PETITION FOR WRIT OF MANDAMUS, OR, IN THE ALTERNATIVE, FOR WRITS OF PROHIBITION AND MANDAMUS

Thomas M. Kavanagh
Attorney General of the State of Michigan
Edmund E. Shepherd
Solicitor General of the State of Michigan
Counsel for Petitioners
The Capitol, Lansing 2, Mich.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. Misc.

G. MENNEN WILLIAMS, Governor of the State of Michigan,

- and -

THOMAS M. KAVANAGH, Attorney General of the State of Michigan,

Petitioners,

v.

HONORABLE CHARLES C. SIMONS, Chief Judge, United States Court of Appeals for the Sixth Circuit,

HONORABLE ARTHUR F. LEDERLE, Chief Judge,

- and -

HONORABLE THEODORE LEVIN, Judge of the United States District Court for the Eastern District of Michigan, Southern Division, together forming a Three-Judge United States District Court constituted under 28 U.S.C. § 2284, pursuant to 28 U.S.C. § 2281,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, OR, IN THE ALTERNATIVE, FOR WRITS OF PROHIBITION AND MANDAMUS

The petitioners move the Court for leave to file the annexed petition for a writ of mandamus, or, in the alterna-

tive, for writs of prohibition and mandamus; and further move that an order and rule be entered directing the Honorable The United States District Court for the Eastern District of Michigan, Southern Division, and the Honorable Charles C. Simons, Chief Judge, United States Court of Appeals for the Sixth Circuit, the Honorable Arthur F. Lederle, Chief Judge and the Honorable Theodore Levin, Judge of the United States District Court for the Eastern District of Michigan, Southern Division, together forming a Three-Judge United States District Court constituted under 28 U.S.C. § 2284 pursuant to 28 U.S.C. § 2281, to show cause why a writ of mandamus, or in the alternative, writs of prohibition and mandamus, should not be issued against them in accordance with the prayer of said petition, and why your petitioners should not have such other and further relief in the premises as may be just and meet.

Thomas M. Kavanagh
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Counsel for Petitioners
The Capitol, Lansing 2, Mich.

PETITION FOR WRIT OF MANDAMUS, OR, IN THE ALTERNATIVE, FOR WRITS OF PROHIBITION AND MANDAMUS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Governor of the State of Michigan and the Attorney General thereof, petitioners herein, respectfully pray:

1. That a writ of mandamus issue from this Court to the Honorable Charles C. Simons, Chief Judge, United States Court of Appeals for the Sixth Circuit, the Honorable Arthur F. Lederle, Chief Judge, and the Honorable Theodore Levin, Judge, of the United States District Court for the Eastern District of Michigan, Southern Division, who together form a Three-Judge United States District Court constituted under 28 U.S.C. § 2284 pursuant to 28 U.S.C. § 2281, requiring them in Civil Action No. 16638 entitled

William W. Voisine, Francis Labadie,
Albert Buday, and Elmer Korn,
Complainants,

v.

John W. Conlin, G. Mennen Williams,
Theodore R. Bohn, and Thomas M. Kavanagh,
Defendants,

forthwith to decide two pending motions filed on the 14th and 22nd days of January, respectively, to wit: (a) the motion of complainants aforesaid for a preliminary injunction, and (b) the motion of defendants [petitioners herein] to dismiss the complaint filed in said cause against them and others.

2. Or, since they have not within a reasonable time decided the important constitutional questions involved in such motions, but have ordered the entire matter held in abeyance indefinitely, that writs of prohibition and mandamus issue from this Court to the respondent Judges directing them to desist and refrain from proceeding further in the cause and to vacate and set aside the temporary restraining order issued on the 14th day of January, 1957 which has the full force and effect of hindering the Governor of the State of Michigan in performance of executive duties required of him by the Constitution and laws of the State with respect to the removal for cause of elected public officers found by him after due notice and hearing to be guilty of official misconduct.[1]

And petitioners respectfully show as follows:

A

Opinions Below

No opinion on the merits of the cause, reported or otherwise, has so far been expressed, handed down, or filed by the respondent Judges who constitute the Three-Judge United States District Court aforesaid.

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[1]

Mich. Const. Art. IX, § 8; Mich. Election Law, Pub. Acts 1954, No. 116, § 397 [Comp. Laws 1948, Mason's 1954 Supp. § 169.327 (Mich. Stat. Ann. 1956 Rev. Vol. 5, § 6.1327; Rev. Stat. Mich. 1846, Ch. 15, §§ 7, 8, 9, and 10 [Comp. Laws 1948, §§ 201.7 to 201.10 (Mich. Stat. Ann. 1956 Rev. Vol. 5, §§ 6.697 to 6.700)]; Mich. Code of Crim. Pro., Ch. VII, § 4 [Comp. Laws 1948, Mason's 1954 Supp. § 767.4 (Mich. Stat. Ann. 1954 Rev. Vol. 25, § 28.944)].

B

Jurisdiction

The writs for which we pray are authorized by 28 U.S.C. § 1651 (a), and are deemed necessary and appropriate in aid of this Court's appellate jurisdiction. Only when the three-judge court below, formed pursuant to 28 U.S.C. §§ 2281, 2284, either grants or denies the pending motion for temporary injunction, or grants or denies the pending motion to dismiss the complaint, can the appellate jurisdiction of this Court be invoked pursuant to 28 U.S.C. § 1253. In our view, no remedy by way of appeal or otherwise is available in any other Court.

C

Questions Presented

In a civil action invoking jurisdiction of the United States District Court for the Eastern District of Michigan by virtue of Art. III, § 2 of the Constitution of the United States and §§ 2201, 2281, 2283 and 2284, Title 28 United States Code, the mayor of a Michigan municipality and members of its council, as complainants, sought both an interlocutory and permanent injunction to restrain the Governor of the State, the Attorney General thereof, a circuit judge and a judge of probate, from enforcing or executing certain statutes of the State which they challenged as unconstitutional on Federal grounds and which provided for the removal for cause of elected public officers found by the Governor, after due notice and a hearing before a judge of probate, to be guilty of acts of misfeasance, malfeasance and nonfeasance, in this case on charges

in writing laid before the Governor by a circuit judge who had conducted an investigation pursuant to one of the statutes in question [sometimes called Michigan's "One-Man Grand Jury Law"] and had at the same time issued warrants for the arrest of complainants on criminal charges involving venality. A District Judge issued a temporary restraining order hindering the Governor in the performance of his duty in the premises. A three-judge court, duly convened, heard complainants' motion for a temporary injunction and defendants' motion to dismiss the complaint on jurisdictional grounds. After full argument and submission of briefs, the three judge court failed to decide any of the constitutional questions presented, and failed to decide the motions which are still pending in the cause. In lieu thereof, the Court entered an order holding in abeyance determination of the questions submitted until termination of the said criminal trials or until the further order of the court, "the restraining order heretofore issued shall remain in full force and effect." Thereafter the Court denied defendants' motion to dissolve the temporary restraining order, or, in the alternative, to pass upon their motion to dismiss. The criminal cases have not been tried nor will they in all probability be heard for several months. Meanwhile, all proceedings to determine whether these public officers should be removed from office for the public good, are restrained.

1. Should this Court issue its writ of mandamus to compel members of the three-judge court to decide such pending motions?

2. In the alternative, in view of the peculiar circumstances, should an appropriate writ issue to direct the three-judge court to dissolve said restraining order?

D

Constitutional Provisions and Statutes Involved

Federal

1. In the complaint filed in the court below, complainants invoked Article I, § 10, Article III, § 2, Article VI, § 2, and the 5th, 6th and 14th Amendments of the Constitution of the United States but since they are published at length therein they need not be repeated.

2. The complaint also cited 28 U.S.C. §§ 2201, 2281, 2283 and 2284, which provide:

"2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, § 111, 63 Stat. 105."

"2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be

granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

"2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968."

"§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing

shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and

determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 965."

3. In our jurisdictional statement, *supra*, we have cited 28 U.S.C. § 1651 (a) which provides as follows:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. . ."

State

1. The Michigan State Constitution, Article IX, § 8, provides for the removal of municipal officers in the following terms:

"Sec. 8. Any officer elected by a county, city, village, township or school district may be removed from office in such manner and for such cause as shall be prescribed by law."

2. The Michigan legislature has implemented this provision of the State Constitution by enacting § 327 of the Michigan Election Law,[2] which provides as follows:

"SEC. 327. The governor shall remove all city officers chosen by the electors of any city or any ward or voting district thereof, when he shall be satisfied from sufficient evidence submitted to him, as hereinafter provided, that such officer has been guilty of official misconduct, or of wilful neglect of duty, or of extortion, or habitual drunkenness or has been convicted of being drunk, or whenever it shall appear by a certified copy of the judgment of a court of record of this state that such officer, after his election or appointment, shall have been convicted of a felony; but the governor shall take no action upon any such charges made to him against any such officer until the same shall have been exhibited to him in writing, verified by the affidavit of the party making them, that he believes the charges to be true. But no such officer shall be removed for such misconduct or neglect until charges thereof shall have been exhibited to the governor as above provided and a copy of the same served on such officer and an opportunity given him of being heard in his defense: Provided, That the service of such charges upon the person or persons complained against shall be made by handing to such person or persons a copy of such charges, together with all affidavits or exhibits which may be attached to the original petition if such person or persons can be found; and if not, by leaving a copy at the last place of residence of such person or persons, with some person of suitable age,

[2] Pub. Act Mich. 1954, No. 116, § 397 [Comp. Laws 1948, Mason's 1954 Supp. § 169.327 (Mich. Stat. Ann. 1956 Rev. Vol. 5, § 6.1327)].

if such person can be found; and if not, by posting it in some conspicious place upon his last known place of residence. No officer who has been removed in accordance with the provisions of this section shall be eligible to election or appointment to any office for a period of 3 years from the date of such removal."

The foregoing section was derived from § 6 of Chapter 15 of the Revised Statutes of 1846, as amended, which was repealed by the 1954 Election Law. The legislature, however, has retained §§ 7, 8, 9 and 10 of Chapter 15, *supra*,[3] to map the procedure which must be followed by the Governor and others in such a removal inquiry. Those sections, in harmony with the Due Process Clause, provide as follows:

"SEC. 7. The governor may direct the attorney general or the prosecuting attorney of the county in which such officer may be, unless such prosecuting attorney be the officer charged, to conduct and inquire into the charges made, and the said attorney general or such prosecuting attorney shall thereupon give at least eight [8] days' notice to the officer accused of the time and place at which he will proceed to the examination of witnesses in relation to such charges before some circuit court commissioner or judge of probate for the same county, or any judge of probate who may be appointed by the governor for such purpose, and he shall also, at the time of giving such notice, serve upon the officer accused a copy of such charges: Provided, however, That if the judge of probate so appointed resides other than in the

[3]

Being Mich. Comp. Laws 1948, §§ 201.7 to 201.10 [Mich. Stat. Ann. 1956 Rev. Vol. 5, §§ 6.697 to 6.700].

county in which the accused resides, such judge of probate shall be paid by such county the sum of ten [10] dollars per day and expenses for time actually used in such hearing.

"SEC. 8. The attorney general or prosecuting attorney may issue subpoenas, signed by him with his name of office, to compel the attendance of any witness whom he shall deem material, before said circuit court commissioner or judge of probate, and such commissioner or judge of probate shall have the same power to enforce obedience to such subpoena by attachment, and to commit any person who shall refuse to be sworn or to answer, as the circuit court would have in a civil cause pending therein, and the fees of such witnesses shall be the same as in civil cases, and shall be a charge against the county.

"SEC. 9. On the application of the officer accused to the prosecuting attorney, or to any justice of the peace, he shall be entitled to the like process of subpoena, obedience to which may be enforced in the same manner, as provided in the last preceding section, by the commissioner or judge of probate before whom the witness may be conducted.

"SEC. 10. At the time and place there specified in the notice, the commissioner or judge of probate, before whom such inquiry shall be conducted, shall proceed to take the testimony of the witnesses produced before him by the attorney general or prosecuting attorney and by the officer accused, which witnesses shall be sworn by such commissioner or judge of probate and every answer given by them to any question, which either party shall require to be reduced to writing, shall be taken stenographically or in writing under

the direction of such commissioner or judge of probate, and such testimony shall be certified by the commissioner or judge of probate, taking the same to be a correct transcript of all of the testimony so taken in said hearing. Such testimony so taken and certified shall be delivered by said commissioner or judge of probate to such prosecuting attorney or attorney general, who shall transmit the same with a summary of such testimony to the governor, and the fees of the commissioner or other officer for the performance of such services shall be a charge against the county."

3. Also involved in the cause pending before the Three-Judge Court are certain provisions of the Michigan Code of Criminal Procedure, Chapter VII, §§ 3 and 4 [Mich. Comp. Laws 1948, §§ 767.3, 767.4 (Mich. Stat. Ann. 1954 Rev. § 28.943, 28.944)], which together with others have at times been termed Michigan's "One-Man Grand Jury Law."[1] Since these sections appear in paragraphs 14 and 15 of the complaint, which challenges their constitutional validity, it suffices at this point to say that § 4, *supra*, includes the following:

". . . And if upon such inquiry the judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance in office or wilful neglect of duty or of any other offense prescribed as a ground of re-

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[1] The institution created by these sections of the Code is not in any sense a "grand jury." The judicial officer who conducts the inquiry is merely a glorified justice of the peace or magistrate authorized to issue warrants authorizing arrest of those accused of crime following investigation and examination of witnesses. No indictment follows the statutory proceedings.

moval, the said judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges."

E

Concise Statement of the Case[5]

First

a. On January 14, 1957 when their complaint (1a-24a) was filed in the court below, William W. Voisine, Mayor of the City of Ecorse, Wayne County, Michigan (4a) and Francis Labadie, Albert Buday, and Elmer Korn, members of that city's council, were facing prosecution in circuit court on informations charging criminal offenses involving venality. Voisine, Labadie and Buday were charged (52a-57a) with a corrupt conspiracy to obstruct justice,[6] while Korn was accused of accepting a bribe.[7]

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[5]

Unless otherwise plainly indicated, numbers in parentheses refer to pages of the Appendix to this petition (1a-134a).

[6]

In Michigan a common-law offense punishable as a felony, Mich. Penal Code, § 505 [Mich. Comp. Laws, § 750.505, (Mich. Stat. Ann. 1954 Rev. Vol. 25, § 28.773)].

[7]

Mich. Penal Code, § 118 [Comp. Laws 1948, § 750.118 (Mich. Stat. Ann. § 28.505)].

b. Such criminal proceedings were instituted when a circuit judge, having conducted an investigation pursuant to §§ 3 and 4 of Chapter VII, the Michigan Code of Criminal Procedure, *supra*, issued warrants (e.g., 27a) for the arrest of these public officers (complainants below). The magistrate, in further compliance with the Code of Criminal Procedure, Chap. VII, § 4, *supra*, transmitted to the Governor of Michigan written findings (38a-46a) that Voisine, Labadie, Buday and Korn as public officers had committed certain specified acts of misfeasance, malfeasance and nonfeasance; and he recommended (45a) that the Governor take all necessary legal steps to remove them from their respective executive and legislative offices.

c. A true copy of such findings was duly served on each officer, together with a notice in writing (37a-38a) apprising him that in accordance with Michigan law,[8] the Governor had directed the Attorney General to inquire into the charges aforesaid; that he had appointed a judge of probate to hear them and, having done so, to certify and transmit to the Governor a correct transcript of all testimony taken; and, further, that such hearing would be held at a designated place in the city of Detroit on the 13th day of November, 1956 at 10:00 a.m. Each was further notified (33a) he might be present in person and by counsel for the purpose of cross-examining witnesses, presenting evidence and making such defenses as he might choose.

d. Following an adjournment upon request of defense counsel (13a), the accused officers filed with the probate judge motions to dismiss and their counsel made strenuous objection to proceeding to a hearing on the removal charges

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[8]

Mich. Rev. Stat. 1846, Chapter 15, § 7, as amended [Mich. Comp. Laws 1948, § 201.7 (Mich. Stat. Ann. 1956 Rev. Vol. 5, § 6.697)].

prior to being heard in the criminal case (14a) mainly because the removal statute amounted to a bill of attainder and put the accused twice in jeopardy. Voisine filed in the removal proceedings a reply and motion which, as alleged in the complaint, filed in the United States District Court (15a), "raised almost each and all constitutional objections to the removal proceedings, and more particularly the situation that the statute provides that the Attorney General . . . shall furnish to the complainant subpoenas," which right, it was further said, was denied him.

e. Moreover, as further alleged in the complaint, paragraph 32 (16a), lengthy affidavits and motions were filed in behalf of all complainants (the accused officers) "indicating and setting forth that they would not be able to obtain witnesses in their own behalf and defense" while the grand jury, so-called, was in session, and while other defendants who might be necessary witnesses for the complainants (accused officers) in defense of the removal proceedings were "under indictment."

f. Furthermore, or so the accused public officers aver (par. 33, 16a) in their complaint, because the charges against them in the removal proceedings were vague, general and indefinite and did not apprise them of the specific nature thereof, the accused made motions for a more specific bill of particulars which was denied by the probate judge.

g. Again, in the removal proceedings, verified documents were filed (16a, par. 34) to the effect that the accused would not be able to obtain witnesses to testify for and in their behalf because said witnesses were "under indictment" in other proceedings and, therefore, could not be compelled to take the stand, as the result of which due process would not be compiled with, but the probate judge ruled he had

no authority except to continue the hearing "unless the proceedings were stopped by a court other than his own."

b. Responding to such motions and objections, the judge of probate, on January 9, 1957, ruled (16a-17a, par. 35) that the proceedings before the Governor were quasi-judicial and not ministerial, and it is apparent that he overruled all of the pending motions, including one for further continuance.

Second

a. Shortly thereafter, on the 14th day of January, 1957, the day before they were to be arraigned in circuit court on the criminal charges aforesaid (17a), and without any attempt to exhaust whatever State remedies might be available, the accused filed their complaint (Appendix A, 1a-24a), with appendices thereto attached (26a-57a), in the United States Court for the Eastern District of Michigan, Southern Division, naming as defendants John W. Conlin, judge of probate assigned to hear the removal charges against them, G. Mennen Williams, Governor of the State, Theodore R. Bohn, Judge of the Third Judicial Circuit of Michigan, who had issued the warrants and made the findings in question, and Thomas M. Kavanagh, the Attorney General of Michigan (1a et seq.).

b. In said complaint, an attack was launched against the several Michigan statutes scheduled in Part "D" of this petition, *ante*, on the asserted ground that as applied to complainants both in the criminal and removal proceedings, such laws of Michigan had violated nearly every known fundamental right preserved by the Constitution of the United States and its several amendments comprising the Bill of Rights. These included, among others, the constitutional questions raised by the complainants in the

removal proceedings before the judge of probate assigned by the Governor to perform that duty.

c. Since such constitutional objections to the statutes here challenged are set forth with great particularity in the complaint, and need not be repeated, we cite the following merely by way of illustration:

1. Attacking, first, the validity of the Michigan Code of Criminal Procedure, Chap. VII, §§ 3 and 4,[9] as applied to the criminal proceedings instituted by a circuit judge conducting an investigation pursuant thereto, it is claimed

(a) that § 4 thereof constitutes a bill of attainder in violation of Art. I, § 10 of the Constitution of the United States (10a-11a, par. 18);

(b) that by virtue of the institution of removal proceedings against them, this section of the Code compels the accused to become a witness against himself in violation of the 5th Amendment (11a, par. 20);

(c) that such sections deny the constitutional right to a speedy trial by an impartial jury since the complainants are being forced to a hearing in the removal proceedings prior to trial on the pending criminal charges (11a-12a, par. 21) in violation of the 6th Amendment; and

(d) that thus they are denied due process of law (12a, par. 22) contrary to the 14th Amendment.

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[9] These and other sections comprise what complainants persistently termed the Michigan One-Man Grand Jury Law.

2. Questioning the constitutionality of such sections of the Code as applied to the removal proceedings, it is claimed

(a) that since § 4 permits the "grand juror" to "indict" a person for crime, then to institute removal proceedings before the Governor, it takes from the hands of the courts of the State and the Federal courts, judicial power vested in them by Article III, § 2 of the Constitution (11a, par. 19);

(b) that in event a public officer should be removed by the Governor, the section affords no remedy to review his orders (15a, par. 30);

(c) that these sections actually confer upon the Governor and his representatives, judicial power to deny a person charged with crime a trial by jury in violation of the 6th Amendment (17a, par. 36);

(d) that the removal proceedings would compel complainants and witnesses in their behalf to take the witness stand and be subjected to cross-examination and possible self-incrimination prior to trial of the criminal charges (17a, par. 37);[10]

(e) that constitutional rights are being jeopardized since the Governor and his aides (defendants below) are attempting "with the greatest zeal and ardor to remove the four complainants . . . from their public offices . . . before they have had any opportunity whatsoever to proceed with or meet the trial of the criminal charges against them" (18a-19a, par. 41); and

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[10] Citing Slochower v. Board of Higher Education, 351 U.S. 551.

(f) That the Governor and his representatives seek, by removal proceedings, "to . . . take away from said complainants their political, private and property rights in the form of their reputations prior to the time that they are able to proceed to a trial in the criminal proceeding" (19a, par. 44).

Third

Complainants' prayers for relief (21a-24a) may be summarized as follows:

a. For an order restraining the Governor and others named as defendants from proceeding further with such removal proceedings until the other matters of relief might be determined by the Court, because of the great irreparable injury, loss and damage that would result to complainants "between the date of the filing of this . . . complaint and of the return date of the order to show cause for a temporary injunction and the motion for the appointment of a three-judge court" (Prayer 4, 21a-22a).

b. It was averred in Prayer 5 (22a) that said temporary restraining order was merely for the purpose of preserving the status quo "until and when the normal judicial processes of this court can be properly invoked to determine whether or not said complainants have material rights to protect."

c. That a three-judge court be organized pursuant to 28 U.S.C. § 2284 and Rule 65 of the Federal Rules of Civil Procedure, "for the purpose of determining that said complainants are entitled to an interlocutory injunction . . ." (Prayer 6, 22a).

d. That upon final hearing a permanent injunction be granted determining in effect that the statutes in question are unconstitutional and void, that the removal proceedings are likewise invalid, and that the warrant and information in the criminal proceedings be determined to have arisen out of a completely void and unconstitutional proceeding in direct violation of the Federal Constitution and decisions of this Court..

Fourth

a. Upon filing the complaint, counsel gave notice (Appendix B, 58a) of motion for a preliminary injunction and for formation of a three-judge court.

b. At the same time, the Honorable Theodore Levin, United States District Judge, issued an order (Appendix C, 62a; 63a) without notice, upon motion of counsel for complainants, restraining the Governor of the State of Michigan, the probate judge and the circuit judge aforesaid, as well as the Attorney General, until January 21, 1957, or until such further date as the court might determine, from "in any manner continuing with the removal and/or ouster proceedings" until the matters set forth in said bill of complaint filed herein may be determined by the court or by a three-judge court which might be organized in accordance with the prayer for relief . . . (63a). The order further provided:

> "This temporary restraining order without notice is issued by this court on the 14th day of January, A.D. 1957, at 12:10 o'clock p.m. in pursuance to Federal Rules of Civil Procedure No. 65, and shall expire 12:00 o'clock noon on Jan. 21, 1957, unless the same is renewed . . ."

c. On the following day, Jan. 15, 1957 a conference was held at chambers of the District Judge at which the Deputy Attorney General and an Assistant Attorney General were present (Appendix D, 64a, 65a). The District Judge announced that a three-judge court had been organized by the Chief Judge of the United States Court of Appeals for the 6th Circuit, who had designated Jan. 29, 1957 at 10:00 a.m. for the hearing. The Deputy Attorney General and the Assistant stated they were agreeable that the restraining order which had been issued by the District Judge should "remain in effect until the matter is disposed of by the three-judge constitutional court."

Fifth

a. On the 22nd day of January, 1957 the defendants to the complaint, the Governor of the State of Michigan and others, filed their answer (Appendix E, 66a-80a) denying the equities of the complaint and setting forth six affirmative defenses and special matters (79a, 80a) bearing on the Court's jurisdiction.

b. At the same time, defense counsel filed a motion to dismiss (Appendix F, 86a-89a) the complaint on similar jurisdictional grounds. A reply (Appendix G, 90a, 91a) having been filed by complainants, the motions came on to be heard January 29, 1957 when the legal questions involved were fully argued, briefs were presented, and the two motions were taken under advisement.

c. On the 1st day of February, 1957 the three-judge court entered an order (Appendix H, 92a), which reads as follows:

> "The application for a temporary injunction and the motion to dismiss the complaint having come on to be heard, and

It appearing that the plaintiffs have been informed against and are now subject to criminal proceedings and removal proceedings arising out of a one-man grand jury inquiry, and

It appearing that the plaintiffs may forthwith be tried in the said criminal trials and that upon determination of the said criminal trials constitutional questions set out in the complaint may then become moot,

And it appearing that the plaintiffs may be prejudiced in the pending criminal proceedings by the investigation of the State in the removal proceedings, therefore,

This Court will hold in abeyance the determination of the questions submitted until the termination of the said criminal trials or until the further order of this Court, and pending such determination by this Court the restraining order heretofore issued shall remain in full force and effect."

d. Thereafter, on Feb. 28, the Attorney General filed a motion (Appendix I, 94a-95a), supported by an affidavit of his deputy (96a-98a), to dissolve the temporary restraining order or, in the alternative, to pass upon defendants' motion to dismiss, assigning among others the following reasons, quickly summarized:

(1) the Court had no legal authority to refuse to decide such motion and enter its order continuing the temporary restraining order in full force;

(2) non-action of the Court on such motion, coupled with its restraining order results in an unconstitutional interference in the political affairs and responsi-

bilities of the Governor of the State of Michigan, viz., the disciplinary authority of the Governor over municipal and local public officers; and

(3) that such interference with the duties and prerogatives of the Governor of the State is inimical to the public good and interest because the Governor is thereby prevented from determining, after hearing, whether public officials should remain in office and be allowed to conduct the public affairs of the municipality.

e. On the 9th day of April, 1957 the three-judge court entered an order (Appendix K, 133a-134a) denying the motion aforesaid on the ground that, treating it as a motion for rehearing, it presented nothing new. And, finally, since its entry, the three-judge court has refrained from deciding any of the important jurisdictional and constitutional questions. The temporary restraining order issued by a District Judge remains in full force and effect.

F

Reasons why Writs should Issue

First: Since mandamus is sought to direct a three-judge court to decide important judicial questions, and since no interlocutory or permanent injunction has been granted or denied, it seems plain that the relief sought is not available by way of appeal, 28 U.S.C. § 1253, to any court including the United States Court of Appeals for the 6th Circuit.[11]

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[11] Query v. United States, 316 U.S. 486.

The writs, we respectfully submit, are appropriate under 28 U.S.C. § 1651 because in a case of great public importance the court below has for an unreasonable length of time refrained from performing the judicial function of granting or denying the interlocutory injunction sought by complainants, or denying or granting the defendants' motion to dismiss the complaint, meanwhile continuing in full force and effect a temporary restraining order issued by a District Judge.[12]

Unlike *Pary v. United States*, 351 U.S. 513, this is a case wherein a court has refused to exercise its authority, and appellate review by this Court will be defeated if writs do not issue. And while the All Writs Act is meant to be used only in exceptional cases where there is a clear abuse of discretion or usurpation of judicial power,[13] we respectfully submit this is one of those rare, extraordinary occasions for which such writs are reserved,[14] because, in this particular instance, the Governor of a sovereign State, as the result of inaction on the part of the court, is hampered in the performance of a clear duty laid upon him by Michigan's Constitution and laws.

Second: The constitutional objections to the Michigan laws in question, raised in the complaint, possess little if any merit and the questions presented should be quickly decided.

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[12]

Ex Parte United States, 287 U.S. 241; Ex Parte Kumezo Kamato, 317 U.S. 69; Ex Parte Peru, 318 U.S. 578; Roche v. Evaporated Milk Association, 319 U.S. 21.

[13]

Bankers Life & Casualty Co. v. Holland, Chief Judge, 346 U.S. 379.

[14]

Cf. Ex Parte Fahey, 332 U.S. 258.

a. It is extremely doubtful that a Federal court of equity, in any circumstances, posseses power to retain State proceedings, already begun, for the removal of public officers deemed recreant in their trust.[15] And this Court has repeatedly determined that an unlawful denial by state action of a right to state political office is not a denial of a right to property or of liberty secured by the Due Process Clause.[16]

By way of analogy, while Federal courts of equity may enjoin State criminal proceedings under a statute alleged to be unconstitutional when their prevention is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate, such an injunction cannot be supported in so far as it embraces proceedings pending in the State criminal court which were instituted before the case was begun.[17] This, we think, should be applied to the removal proceedings which in this instance were instituted before action was begun in the court below to enjoin them.

b. So, also this Court has held that in the absence of a clear showing of necessity, a Federal court of equity will not restrain the institution of a criminal prosecution in a state court [a fortiori, here, the continuance of removal proceedings before a Governor] upon the ground that the

[15]

In re Sawyer, 124 U.S. 200; White v. Berry, 171 U.S. 366; Harkrader v. Wadley, 172 U.S. 148, 165; Walton v. House of Representatives, 265 U.S. 487.

[16]

Taylor & Marshall v. Beckham, 178 U.S. 548; Cave v. Newell, 246 U.S. 650; Snowden v. Hughes, 321 U.S. 1, 7.

[17]

Cline v. Frink Dairy Co., 274 U.S. 445.

statute defining the offense violates the Federal Constitution, but will leave the party to set up the federal question in the state court and to his right of review in this Court.[18]

c. While its constitutional authority to confer power of removal of public officers upon the Governor can no longer be questioned,[19] the Michigan legislature may not; by any act, deprive a person of his right to hold an office to which he has been elected and whose duties he has assumed, except by due process of law, *Metevier v. Therrien*, 80 Mich. 187, 195. Hence it has followed that the laws of the State which map procedure in all such cases, afford the accused official all essentials of due process: *viz*, written specifications of the nature of the charges; due and timely notice of hearing before a judge of probate; opportunity to be represented by counsel; the right to appear in person or by counsel; the right to cross-examine witnesses who testify against the accused, and to adduce testimony on his own behalf.[20] And while an officer who has been removed may not obtain from the Michigan Supreme Court a writ of certiorari running directly to the Governor,[21] he may effectually

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[18]

Spielman Motor Co. v. Dodge, 295 U.S. 89.

[19]

Clay v. Stuart, 74 Mich. 411; Metevier v. Therrien, 80 Mich. 187; Attorney General v. Jochim, 99 Mich. 358.

[20]

Rev. Stat. Mich. 1846, Chapter 15, §§ 7, 8, and 9 [Comp. Laws 1948, §§ 201.7-201.10 (Mich. Stat. Ann. 1956 Rev. §§ 6.697-6.700)].

[21]

Germaine v. Governor, 176 Mich. 585.

test the validity of such proceedings by way of *quo warranto*.[22]

When the complaint was filed in the court below, removal proceedings were already in progress before the probate judge to whom the Governor had assigned the duty of conducting a hearing, and the accused officers had been accorded all of the rights and privileges enumerated above. Moreover, counsel for the accused had filed and argued several motions which raised substantially the same constitutional questions and claims later presented to the United States District Court in the complaint. The Governor had not passed upon the merits of the case; and he had not entered an order ousting the complainants.[23]

d. At the same time, when the complaint was filed, counsel for the accused had taken all necessary steps to protect the constitutional rights of their clients, the accused public officers, by moving to quash the informations on the ground, inter alia, that the Michigan "One-man Grand Jury Law," so-called, under which warrants of arrest had issued, violated the Due Process Clause of the Fourteenth Amendment.

We respectfully submit that unless it can be said that Michigan no longer possesses sovereignty, that the complainants below should first exhaust all State remedies.

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[22] In Michigan quo warranto lies to test the legality of the removal of a relator from a public office by the Governor and if he has not been accorded due process, in strict conformity to the statute, judgment of ouster against his successor will be entered. Metevier v. Therrien, 80 Mich. 187.

[23] It cannot be alleged with any degree of truth that Governor Williams, who is a man of undoubted integrity, has prejudged the charges against these public officers.

Since criminal prosecution had already been commenced by issuing warrants and was well under way, and since removal proceedings were in progress, the complainants, if aggrieved by conviction or removal, will have adequate State remedies by appeal from possible conviction, and, in event of affirmance, by petition to this Court for a writ of certiorari. Should they be removed from office by the Governor, much the same line of procedure lies open. In our view, and we respectfully submit it was never intended as a part of our system of federalism that an accused person against whom state criminal or removal proceedings have been instituted, may have free access to a Federal court of equity to determine in advance what the State courts should decide on constitutional questions.

e. It has been suggested by complainants that a hearing on removal charges in advance of trial of criminal accusations in the State court, will greatly prejudice them therein. We respectfully submit that if the accused's constitutional right to a fair and impartial trial on criminal charges in the state court is infringed by virtue of the removal proceedings, and this should manifestly appear, then, in such event, any conviction so obtained could be reversed by the Michigan Supreme Court on appeal or by this Court on certiorari. It is the State which must assume that risk.

WHEREFORE, petitioners respectfully pray that an order issue out of and under the seal of this Honorable Court directed to the respondent Judges named herein requiring them on a day certain to show cause why the writs prayed for in the opening paragraph of this petition should not be granted. And that the Court grant to peti-

tioners such other and further relief as may be deemed just and appropriate.

Respectfully submitted,

G. Mennen Williams
Governor of the State of Michigan.

Thomas M. Kavanagh
Attorney General of the State of Michigan

By Edmund E. Shepherd
Solicitor General of the State of Michigan